

Issues for "Phase II"
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S.2525 -- FIRST AND FOURTH AMENDMENT ISSUES

Background

Titles II and III of S.2525 authorize and regulate the collection of information about United States persons, and foreign persons in the United States, for intelligence purposes. The objective is to ensure that legitimate intelligence activities are conducted in a manner that preserves and respects established concepts of privacy and civil liberties. These concepts are embodied in the First and Fourth Amendments, although fundamental principles of due process and equal protection are also at stake. The central question is whether S.2525 adequately protects civil liberties without unduly restricting necessary intelligence activities.

The issue in some cases is whether a particular activity should, itself, be considered legitimate. Examples include the investigation of a U.S. person without his consent because he is a "potential source" of intelligence, use of the contents of private international communications to or from U.S. persons that are "unintentionally" acquired through foreign signals intelligence activities, or the violation of a federal criminal law where necessary to protect against acts of espionage or international terrorism. S.2525 treats each of these as legitimate within prescribed limits.

In other cases the issue is whether a concededly legitimate activity requires procedural safeguards in order to keep it within proper bounds. Examples are the requirements for a court order to target electronic surveillance against a U.S. person abroad, and for approval by the Attorney General's designee when investigations of U.S. persons use covert techniques or last longer than six months. Do such procedures impose unjustified burdens, or do they provide external checks that are significantly better than reliance upon each agency to police itself under congressional oversight scrutiny.

In general, civil liberties critics of S.2525 fear it would allow abuses of the past to recur. They foresee, for instance, a possible resumption of CIA or military intelligence infiltration of American dissident groups abroad under the authority to investigate undefined "clandestine intelligence activity," or a return to widespread FBI surreptitious entries under the court order procedure permitting multiple searches. On the other hand, the intelligence agencies contend that detailed statutory limitations would deprive them of the flexibility they need to meet unanticipated problems. They would prefer broad statutory authorizations accompanied by Executive branch guidelines subject to review by the congressional oversight committees.

Both sides suggest that S.2525 is too complex. Simplification might, however, lead either to more stringent across-the-board restrictions or to the elimination of safeguards and limitations. The Committee's deliberations on S.1566, the Foreign Intelligence Surveillance Act, indicate that some degree of complexity may be the price for reaching a satisfactory accommodation of interests. That bill, which would replace the parts of S.2525 covering electronic surveillance within the United States, was reported favorably by the Committee, 15-0, and is on the Senate calendar for floor consideration. Titles II and II of S.2525 extend beyond domestic electronic surveillance to reach --

(a) foreign intelligence, counterintelligence, and counterterrorism investigations of U.S. persons, and foreign persons in the United States, using less intrusive techniques;

(b) foreign electronic or signals intelligence activities resulting in the collection of information concerning U.S. persons; and

(c) unconsented physical searches or mail opening within the Untied Staess or directed against U.S. persons abroad.

The following questions explore some of the issues posed by these provisions.

I. Preventive Action

1. Are the preventive measures permitted in sections 242-243 consistent with due process of law? They include anonymous dissemination of information (242) and limited violation of Federal criminal statutes (243) when necessary to protect against espionage, international terrorism, or related acts.

2. Is it appropriate to prohibit any intelligence activity that is designed and conducted so as to limit, disrupt, or interfere with any U.S. person's exercise of rights protected by the Constitution or laws of the United States? (See section 241.)

3. In general, should the legal principles governing preventive law enforcement apply fully to foreign counter-intelligence or counterterrorism measures taken within the United States or against U.S. persons abroad?

II. Rights of Foreign Persons in the United States

1. Does equal protection require that intelligence charter legislation safeguard any rights of foreign powers, foreign organizations, or non-resident aliens when they are in the United States? Should they be excluded from protection? Or should restrictions apply only to the use of techniques that would require a warrant for law enforcement purposes?

2. Is it proper to allow virtually unlimited investigations of non-resident aliens in the United States who are reasonably believed to be potential intelligence sources, without the restrictions on techniques and duration for comparable investigations of U.S. persons? (See section 225(4).) In particular, are such investigations of foreign students consistent with academic freedom?

3. Similarly, is it appropriate to authorize investigations of unofficial foreign visitors and private foreign organizations in the United States to obtain "significant" foreign intelligence? (See section 225(3))

4. Should the prohibition against activities designed and conducted to limit, disrupt, or interfere with the exercise of constitutional or legal rights (section 241) be extended to rights exercised by non-resident aliens in the United States?

5. Should other restrictions such as the limits on duration and techniques of investigation or on retention and dissemination of private information, apply to non-resident aliens in the United States who are not agents of a foreign power? Would a revised definition of "United States person" resolve some of these difficulties? (See section 104(31).)

III. Investigations of U.S. Persons

1. Should there be an across-the-board ban against intelligence agencies investigating U.S. persons without their consent, unless there is reason to believe that they may violate the law?

2. Would the so-called "noncriminal" investigations of U.S. persons authorized in the bill have a chilling effect on the exercise of First Amendment rights or unreasonably invade personal privacy? Or do the limitations and procedures, including the prohibition against basing investigation solely upon a U.S. person's exercise of constitutional or legal rights (section 241), provide adequate safeguards? Such investigations include --

(a) persons reasonably believed to be engaged in clandestine intelligence activity abroad (section 213(2));

(b) persons acting in an official capacity for a foreign power abroad (sections 213(3) and 214(3));

(c) targets of foreign intelligence or terrorist recruitment efforts (section 218(a)(1));

(d) targets of clandestine intelligence or international terrorist activity (section 218(a)(2));

(e) persons who possess significant foreign intelligence (section 219);

(f) persons in contact with suspected intelligence agents (section 220); and

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(g) persons reasonably believed to be potential intelligence sources (section 221).

3. Should investigations of U.S. persons believed to be engaged in "clandestine intelligence activity" abroad include persons suspected of writing, speaking, or otherwise engaging in lawful political expression on behalf of a foreign power? (See the definition in section 204(b)(1).)

4. Should investigations of targets of "clandestine intelligence collection activity" include U.S. persons who are targets for the gathering of information about their lawful political activities not involving classified information? If a Congressman or a group leader like Dr. Martin Luther King were such a target, should he be investigated? Or should any investigation be limited to the suspected intelligence agent?

5. Should certain investigations of U.S. persons based on a "reasonable belief" standard continue indefinitely, so long as the Attorney General's designee grants periodic written approval? (See sections 216-217.) Or should a "probable cause" standard be met after six months or one year?

6. Should intelligence agencies have authority to investigate their former employees, contractors, or employees of contractors who are suspected of having violated agency rules or regulations?

IV. Intrusive Investigative Techniques

1. Should any techniques be added to, or deleted from, the provision requiring approval by the Attorney General's designee for an investigation using certain techniques? (See section 215.)
 - (a) Should "covert interviews" and similar pretextual inquiries be added?
 - (b) Should physical surveillance or the direction of established covert human sources to collect information be deleted?
 - (c) Should any of these techniques be permitted in "target" investigations under section 218?
2. Would it be appropriate to require a court order for the use of paid undercover agents or informants to investigate a U.S. person? Or to require a subpoena for access to confidential private records concerning a U.S. person, as recommended by the Privacy Commission?
3. Would it be an adequate safeguard to require that the agency head, rather than the Attorney General's designee, approve investigations of U.S. persons using certain intrusive techniques, such as physical surveillance, covert human sources, and requests for confidential private records?
4. Is it appropriate to modify the Title I restrictions on cover and paid relationships with certain categories of

individuals, insofar as they conflict with the provisions of Title II authorizing the use of "covert human sources" in foreign counterintelligence and counterterrorism investigations? For example, should the FBI be able to recruit a journalist or academic as an undercover informant in an espionage case?

V. Electronic Surveillance, Physical Search, Mail Opening

1. Under what circumstances, if any, should an intelligence agency be authorized to use or disseminate the contents of private international communications to or from U.S. persons that are acquired "unintentionally" by foreign signals intelligence activities? (S. 1566 would require destruction upon recognition of the contents of any private domestic radio communication that is acquired "unintentionally," unless the contents indicate a threat of death or serious bodily harm to any person.)

2. Does a U.S. person have any less "reasonable expectation of privacy" with respect to his international or foreign communications than with respect to his domestic communications?

3. If S. 1566 is enacted, establishing a special court to issue orders approving electronic surveillance within the United States, would it be proper to assign that court the duty of issuing orders for foreign electronic or signals intelligence

activities directed against U.S. persons abroad?

4. Are the standards and procedures for targeting foreign electronic or signals intelligence activities against a U.S. person abroad appropriate?

5. Are such standards and procedures also appropriate for directing unconsented physical searches against U.S. persons abroad, or for the unconsented opening of mail of a known U.S. person outside United States postal channels?

6. Are the court order procedures for unconsented physical searches within the United States consistent with fundamental Fourth Amendment principles?

(a) Is it proper to allow court orders authorizing multiple searches, in view of the normal Fourth Amendment requirement that a warrant particularly describe the person or place to be searched and the material to be seized?

(b) Should surreptitious entry be confined to emergency or extraordinary circumstances?